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No. 89-___

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In The

Supreme Court of the United States

October Term, 1989

City of Little Rock, Arkansas, Walter E. "Sonny" Simpson, E.H. "Doc" Hale, Joe Thomas, Brad Furlow, Lottie L. Shackelford, J.W. "Buddy" Benafield, Sharon Priest, Tom Milton, Thomas Prince, and F.G. "Buddy" Villines,

Petitioners,

v.

Reather Reynolds, as Administratrix of the Estate of John Willie Reeves, deceased, and in her own behalf,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether in a civil action use of peremptory challenges by government litigants to strike the only blacks on the venire violates the Equal Protection Clause of the Fourteenth Amendment as construed in *Batson v. Kentucky*, 476 U.S. 79 (1986).

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioners pray that this Court grant this petition to review a decision of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the Court of Appeals is contained in the Appendix. The official citation to the opinion is *Reynolds v. City of Little Rock*, 893 F.2d 1004 (1990).

STATEMENT OF JURISDICTION

This petition seeks review of the opinion of the United States Court of Appeals for the Eighth Circuit delivered June 15, 1989. Rehearing was denied by Order entered March 26, 1990, with three Circuit Judges noting a desire to grant rehearing *en banc*. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The petitioners respectfully suggest that this Court should grant certiorari pursuant to Sup.Ct.R. 10.1(a) to resolve a conflict between the Eighth, Eleventh and Fifth Circuits, and, to review a decision of a United States Court of Appeals on an important question of federal law. Sup.Ct.R. 10.1(c).

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV, § 1 of the U.S. Constitution states in relevant part:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This lawsuit was brought pursuant to 42 U.S.C. § 1983 against the City of Little Rock, Arkansas, its former chief of police, members of its Board of Directors and two police supervisors. The District Court had jurisdiction pursuant to 28 U.S.C. § 1343. The respondent alleged that her federal constitutional rights and those of her late son, John Willie Reeves, were violated when three officers of the Little Rock Police Department shot and killed Mr. Reeves as he lunged at another officer with a knife during a struggle on October 9, 1984.

The respondent and two of the petitioners – Lottie Shackelford and Charles Bussey, members of the Board of Directors – are black.

During jury selection the petitioners (hereafter "the City") exercised two of its peremptory challenges to strike, *inter alia*, the only two blacks on the venire. After the jury was sworn, the respondent's attorney noted for the record that all the black jurors had been struck. The District Court asked counsel for the City if he wanted to justify the use of peremptories. Counsel declined. No relief was requested by the respondent. The District Court noted the respondent's comments and, since the jury had been sworn, allowed the trial to proceed.

After a three-day trial, the jury returned a verdict for the City. Judgment was entered on September 19, 1988.

On appeal to the United States Court of Appeals for the Eighth Circuit, the respondent raised four issues, alleging in one that the City's use of peremptories to strike black jurors constituted purposeful discrimination

prohibited by *Batson v. Kentucky*, 476 U.S. 79 (1986). The Court had jurisdiction pursuant to 28 U.S.C. § 1291.

On June 15, 1989, the Eighth Circuit affirmed on all issues except that raised pursuant to *Batson*. Reaching the issue for the first time, the Circuit Court held that *Batson* applies in a civil case involving governmental actors. *Reynolds v. City of Little Rock*, 893 F.2d 1004, 1009 (8th Cir.1990) [App.9-10]. The case was remanded to the District Court to determine if the respondent had made out a prima facie case of discrimination and, if so, to hold a hearing to determine if the use of the peremptories was racially motivated. 893 F.2d at 1009-10 [App.13] The District Court was ordered to affirm the judgment unless it determined the City used its peremptories in a discriminatory manner. If so, a new trial was to be ordered.

The City filed a timely petition for rehearing with a suggestion for rehearing *en banc*. On March 26, 1990, with three judges voting to grant rehearing en banc, the Eighth Circuit denied rehearing both en banc and by the panel. The City has filed this petition before the hearing on remand.

REASONS FOR GRANTING THE WRIT

This case provides the Court an excellent opportunity to determine if the rule in *Batson* concerning the use of peremptory challenges should be applied in civil cases involving government litigants.

The issue in this case is whether the rule of *Batson v. Kentucky*, 476 U.S. 79 (1986), generally extends to civil cases and, if not, then to civil cases involving government

defendants sued both individually and in their official capacities.

The Eighth and Eleventh Circuits have held that *Batson* necessarily extends to all cases in which the government is a party. *Reynolds v. City of Little Rock*, 893 F.2d 1004, 1005, (8th Cir.1990); *Fludd v. Dykes*, 863 F.2d 822 (11th Cir.1989), *cert. denied sub.nom. Tiller v. Fludd*, 110 S.Ct. 201 (1989). These decisions are in conflict with that of the Fifth Circuit holding *Batson* does not apply to the civil justice system. *Edmonson v. Leesville Concrete Co.*, 895 F.2d 1308 (1990), *petition for cert. filed (May 31, 1990) (No. 89-7743)*. This Court should grant the writ to resolve this conflict between circuit courts of appeals. Sup.Ct.R. 10.1(a). The Court should also grant the writ because the arguably more narrow holding by the Eighth and Eleventh Circuits that *Batson* applies only to civil cases involving governmental litigants is an important question of federal law which should be settled by this Court. Sup.Ct.R. 10.1(c).

The City notes that a petition for writ of certiorari in *Edmonson* is presently pending before this Court. The City respectfully suggests that if the Court grants *certiorari* in *Edmonson*, it should also grant the writ in this case and set both cases for plenary review at the same time for the reasons set forth below.

1. The Fifth Circuit has declined to extend this Court's rule in *Batson* "into the civil area, where the considerations on which *Batson* is based are, if present at all, far weaker than in the criminal field." *Edmonson*, 895 F.2d at 226. The Eleventh Circuit is in direct conflict. "We believe, however, that the policies underlying the

Supreme Court's decision in *Batson* are equally applicable in the civil context." *Fludd*, 863 F.2d at 828. The Eighth Circuit agrees, " . . . the Fourteenth Amendment does not contain any latent distinctions between criminal and civil process." *Reynolds*, 893 F.2d at 1008 [App. 9].

At the time this Court denied certiorari in *Fludd*, neither *Edmonson* nor *Reynolds* had been finally reviewed by the Fifth and Eighth Circuits. This review is now complete and the conflict between these three cases is apparent. Because the proper selection of a jury is an issue of importance in all significant state and federal civil litigation, this court should grant the writ to resolve this conflict.

2. Conceivably *Edmonson* can be distinguished from this case since all the litigants in *Edmonson* are private parties, where here only the plaintiff is a purely private party. This should be a distinction without significance for purposes of *Batson*, but it is the essence of the Eighth Circuit's holding.

> The distinction that is crucial for application of equal-protection principles is that between governmental actors and private actors.
>
> * * *
>
> . . . [A] state actor may not exercise peremptory challenges with the intent to exclude black people from the jury, whether in a criminal or a civil trial. We conclude that *Batson* applies to the conduct of a governmental litigant in a civil trial. . . .

Reynolds, 893 F.2d at 1008 [App. 2-3]; at 1005 [App. 9-10].

In *Edmonson* the Fifth Circuit rejected the notion that a District Court's ministerial act of excusing a juror pursuant to a party's peremptory challenge constituted "state action" for purposes of equal protection analysis. 895 F.2d at 221. The suit was between a black plaintiff and a concrete company for injuries suffered while plaintiff was working at a federal enclave. Because both plaintiff and the defendant were private parties represented by private counsel, the court found no state action. "As for private counsel, it is inconceivable to us that a privately-retained lawyer, serving a private client in a damage suit such as this, should be viewed as a state actor." *Id.* at 222. However, the Fifth Circuit left unanswered whether its ruling would apply when "the state appears as a litigant." *Id.* n. 10.

The Eighth Circuit, on the other hand, focused on the fact that the defendants were government employees represented by a government lawyer. *Reynolds*, 893 F.2d at 1008 [App. 10]. Even though the defendants were sued in both their individual and official capacities, the court declared that "[t]he City cannot exempt itself from the Equal Protection Clause simply because its counsel also represents individuals." *Id.* at 1009 [App. 12]. The court left open "whether the action of the court alone, in a case involving no governmental litigants, can supply the necessary element of governmental action." *Id.* at 1008 n. 2 [App. 10].

Even if the Fifth Circuit is correct about civil cases involving purely private litigants, the question still remains whether *Batson* applies to civil cases in which a governmental entity or its employees are litigants. This issue is an important question of federal law that has not

been, but should be, decided by this Court since a significant portion of all state and federal litigation involves governmental entities, lawyers and litigants. Since the Eighth Circuit applied *Batson* to such litigation in *Reynolds*, while the Fifth Circuit has left open the possibility of a contrary ruling, this Court should grant the writ to resolve this important question.

3. A corollary is whether *Batson* applies if governmental defendants are sued in both their official and individual capacity. This distinction is significant. If found liable in an individual capacity, the defendant is not only subject to paying the judgment and plaintiff's attorneys' fees, he is also subject to pay punitive damages. It is clear that local governments do not have to pay fees for verdicts against public employees sued in their personal capacity. *Kentucky v. Graham*, 473 U.S. 159 (1985). It is also clear that local governments are not subject to punitive damage awards. *Newport v. Fact Concerts*, 453 U.S. 247 (1981).

If a private litigant is not subject to *Batson*, then a defendant sued in his individual capacity should have the right to exercise peremptory challenges in the same manner as any other private litigant. How to accomplish this, though, presents a plethora of complications. For example, will the individual and official capacity suits have to be submitted to separate juries? Or, will the plaintiff have to forego seeking damages from a government employee personally in order to enjoy the application of the *Batson* rationale?

Of course, if *Batson* is not applicable to any civil case, then these problems are mooted. This Court should grant

the writ and hold that *Batson* does not apply to any civil case.

4. A fourth reason to grant the writ is to determine if it is merely the employment status of a civil litigants' counsel that determines whether the use of a peremptory challenge constitutes "state action" for purposes of Equal Protection jurisprudence. The ruling in *Reynolds* equates public employment status of counsel with state action for purposes of equal protection analysis. 893 F.2d at 1009 [App. 12]. This Court has refused to paint state action with such broad strokes. *Polk County v. Dodson*, 454 U.S. 312 (1981). The Court should grant the writ and hold that the public employment status of a civil litigants' counsel does not make the decision to strike a juror a state act under the *Batson* rationale.

Nothing in Fourteenth Amendment jurisprudence supports such an assumption. *Polk County; Edmonson*, 895 F.2d at 222. It may be impossible to reconcile *Reynolds* with this Court's analysis in *Polk County*. There the plaintiff filed an action under 42 U.S.C. § 1983 against an Iowa county and its Offender Advocate – an appellate public defender employed by the county to represent indigent criminal defendants. The plaintiff alleged that the appellate defender violated his constitutional rights by moving to withdraw from his appeal. This Court held that the public defenders' employment status was "insufficient to establish that a public defender acts under color of state law within the meaning of § 1983." *Id.*, 454 U.S. at 320-21. Of course, such a finding is an essential prerequisite for Fourteenth Amendment state action.

The relevant facts of *Dodson* and this case are virtually identical. In both cases the attorneys hold public positions and are salaried employees of a governmental entity. The conduct at issue in both cases includes the official duties of the attorneys. This Court should conclude, as it did in *Dodson*, that the status of a civil defendant's attorney, regardless of who employs him, is "identical to that existing between any other lawyer and client." 454 U.S. at 318. If the Court so holds, then the "state action" element of *Batson* is negated, and the equal protection argument fails. *Accord, Edmonson*, 895 F.2d at 221 (. . . "for if governmental action is not present, then the courts hold no warrant to interfere, in the name of equal protection, with the system of civil peremptory challenges.").

To hold that the employment status is the catalyst for applying *Batson* leads to absurd results. For example, a government litigant sued in an individual and official capacity may need only to retain private counsel to avoid the applicability of the *Batson* rationale to the individual liability aspect of the case. The evil that *Batson* seeks to avoid may thus be negated by the presence of two different lawyers for each defendant at counsel table since in § 1983 litigation "unless a distinct cause of action is asserted against the entity itself, the entity is not even a party to a personal-capacity lawsuit. . . . " *Kentucky v. Graham*, 473 U.S. at 168.

Additional problems can arise if the determination of state action turns upon the question of who retains counsel. Consider the facts of this case. The City has a City Attorney's office staffed by full time attorneys precluded from outside practice. If the City retains private counsel

to represent employees sued in both their individual and official capacity, then do private counsel's decisions constitute state action? Or, if the City does not retain private counsel, but pays the insurance premiums to a company that retains private counsel as a part of its coverage, then do insurance counsel's decisions constitute state action? Or, if both private counsel and a City Attorney agree to preempt a particular juror, does the private attorney have to justify the peremptory if the District Court does not accept the City Attorney's justification? Or, if the District Court accepts the City Attorney's justification, but believes there is a discriminatory basis for the private attorney's actions, does the private attorney's decision constitute state action which precludes the exclusion of the juror? This litany is not a parade of imaginery horribles; it is a list of issues that can and will arise if the applicability of the *Batson* rationale turns on the employment status of counsel.

Nothing in *Batson* suggests that its holding was intended to focus merely on the status of counsel. To the contrary, *Batson*, focused on the nature of the proceeding. For this additional reason, the Court should grant the writ and hold that the public employment status of counsel in a civil case does not necessitate the application of *Batson* to the civil case.

5. Despite the Eighth Circuit's ruling to the contrary, critical distinctions between criminal and civil trials militate against the extension of *Batson* to civil cases. There is clearly state action in the decision to charge a defendant with an offense. No similar state action is present in the decision of a plaintiff to seek damages

against a civil defendant who happens to be a government employee. Since state action is the touchstone of equal protection guarantees, the absence of state action in civil trials should preclude the application of the *Batson* rule. The Eighth Circuit attempts to leap the state action hurdle with the following logic.

> The most obvious difference between a prosecutor and a city lawyer in a § 1983 action is that a state prosecutor threatens a private defendant with loss of life or liberty, while the government lawyer in a civil suit seeks only to deny the private adversary a judgment. This difference of degree is not relevant in the present context.

Reynolds, 893 F.2d at 1009 [App. 11]. This Court should decide that the different roles of prosecutors and government attorneys in the civil trial setting is not only relevant for purposes of extending *Batson*, but it is also a critical distinction.

Clearly the rule in *Batson* is appropriate in the criminal setting since the potential for the arbitrary exercise of governmental power exists. To this end, this Court emphasized that the criminal petit jury was designed to protect criminal defendants from the unfettered exercise of arbitrary governmental power. 476 U.S. at 86. Hence, "[p]urposeful racial discrimination in selection of the venire violates a *defendant's* right to equal protection because it denies him the protection that a trial by jury is intended to secure." 476 U.S. at 86 [Emphasis added]

Nowhere in *Batson* does the Court suggest that it is to be extended to all cases and all litigants. The Court has yet to apply the ruling to criminal defendants. 476 U.S. at

88 n.12. Yet, despite this Court's reservations about the applicability of *Batson*, the Eighth and Eleventh have resolved to extend *Batson* to civil cases.

The *Batson* analysis appears to be limited to the unique relationship between litigants in a criminal case. This relationship is one that has fundamental constitutional guarantees that are otherwise absent in a civil case. For example, the Sixth Amendment, applied to the states through the Fourteenth Amendment, guarantees the criminal defendant: an absolute right to jury trial except for the most petty offenses; the right to counsel, paid for by the State if necessary; the right to a jury trial by a venire chosen from a cross section of the community. Similarly, the Fifth Amendment guarantees that the criminal defendant does not have to testify, much less testify adversely to his interests. In short, the Constitution recognizes the great disadvantage that a criminal defendant has against the power of the State, and thus imposes special protections against the unfettered use of State power.

The power of the government is not at the disposal of the civil defendant. For example, the criminal and civil defendants are both without power to control whether litigation will be brought. The decisions of whether to sue, when to sue, what issue to pursue, and what forum to choose, etc., are all made by the civil plaintiff, not the government defendant. Even the type of relief requested is a matter the civil plaintiff decides. Moreover, the jury is not an instrument of, nor a safeguard against, either party's power in a civil case as it is in a criminal case. *See Batson*, 476 U.S. at 85.

Here the City's lawyers had no more power or authority than respondent's lawyers. Yet, the *Batson* rule was applied against the City as if it were the equal to a prosecuting attorney in a criminal case.

Because there are significant factors that distinguish criminal and civil cases, the Court should grant the writ and hold that the rationale of *Batson* does not apply in civil cases simply because the government is a litigant.

6. Finally, the Court should grant the writ in this case and hold, at a minimum, that a challenge under *Batson* must be made before the jury is sworn.

Here respondent did not object to the composition of the jury until after the venire had been dismissed and the jury sworn. The Eighth Circuit rejected the City's argument that respondent had waived its objection and said that "[i]f the objection was . . . timely enough for the District Court, we will not bar Reynold's appeal on this ground." *Reynolds*, 893 F.2d at 1009 [App. 13]. The fact the District Court entertained a motion should not save an objection if it was untimely.

In *Batson*, this Court took special note that "defense counsel moved to discharge the jury before it was sworn." 476 U.S. at 83; *accord*, *Edmonson*, 895 F.2d at 219; *Fludd*, 863 F.2d at 824. The Fifth Circuit has held that "[t]he Court in *Batson* envisioned that a motion to strike would be made promptly, probably before the venire was dismissed." *United States v. Forbes*, 816 F.2d 1006, 1011 (5th Cir. 1987).

State appellate courts also have universally held that challenges to the composition of the jury must be made

before the jury is sworn. *See e.g., Swain v. State*, 504 So.2d 347, 349 (Ala. Crim. App. 1986) ("In light of *Batson*, the proper time to raise such an objection was . . . prior to the jury being sworn."); *State v. Peck*, 719 S.W.2d 553, 555 (Tenn. Crim. App. 1986) ("The appropriate time for such a motion is prior to the acceptance and swearing in of the jury."); *Williams v. State*, 712 S.W.2d 835, 840 (Tex. App. 1986) ("In light of *Batson*, the proper time to raise such an objection was . . . prior to the jury being sworn."); *State v. Clay*, 355 S.E.2d 510, 512 (N.C. App. 1987) ". . . [T]hough the *Batson* court did not discuss the issue of timeliness, the court's recitation of the facts of the case shows that the defendant moved to discharge the jury before it was sworn.").

In fact, in a previous case the Eighth Circuit said that "failure to object at the time the jury is empaneled operates as a conclusive waiver if the basis of the objection is known . . . ". *Batsell v. United States*, 217 F.2d 257, 260 (8th Cir. 1954).

Because there is now an apparent conflict between the Eighth and Fifth Circuits as to when a *Batson* challenge must be made, the Court should grant the writ and resolve the conflict.

CONCLUSION

For the foregoing reasons, the Court should grant the writ and set this matter for argument. Because this case presents a slightly different, but significant, question than that presented in the petition of *Edmonson v. Leesville Constr. Co.*, the City respectfully suggests that the Court

should either grant the writ in this case, or grant the writ in both cases and set them for argument at the same time.

Respectfully submitted,

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APPENDIX

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Order denying Rehearing and Suggestion for rehearing *en banc* ..... App. 14

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2540

Reather Reynolds, as Administratrix of the Estate of John Willie Reeves, deceased, and in her own behalf,

Appellant,

v.

City of Little Rock; Walter E. "Sonny" Simpson; E.H. "Doc" Hale; Lieutenant Joe Thomas; and Sergeant Brad Furlow of the Little Rock Police Department, each and all in their official and personal capacities; Lottie L. Shackleford; J.W. "Buddy" Benafield; Sharon Priest; Tom Milton; Charles Bussey; Thomas Prince; and F.G. "Buddy" Villines, individually and in their personal and official capacity as elected members of the Little Rock City Board of Directors,

Appellees.

On Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: June 15, 1989

Filed: January 12, 1990

Before ARNOLD, Circuit Judge, ROSS, Senior Circuit Judge, and CAMBRIDGE,* District Judge.

ARNOLD, Circuit Judge.

John Willie Reeves, a mentally disturbed black man, was killed by gunfire from several members of the Little Rock Police Department as he advanced toward a police officer waving a pocket knife. Reather Reynolds, as administratrix of Reeves's estate, brought this action under 42 U.S.C. § 1983 against the City of Little Rock, members of the City Board of Directors, and members of the Little Rock Police Department. Reynolds's complaint alleged that the police officers used excessive force in shooting Reeves, and that the City had fostered this alleged constitutional deprivation by failing to enforce adequate standards for the use of deadly force. The jury found for the defendants. On appeal, Reynolds urges that the District Court erred in excluding certain evidence and in commenting on the testimony of Reynolds's expert witness. We affirm the District Court on these issues.

Reynolds further argues that the City Attorney's use of peremptory strikes to remove the two black members of the venire constituted purposeful discrimination prohibited by *Batson v. Kentucky*, 476 U.S. 79 (1986). We agree that a state actor may not exercise peremptory challenges with the intent to exclude black people from the jury, whether in a criminal or a civil trial. We conclude that *Batson* applies to the conduct of a governmental litigant

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* The Hon. William G. Cambridge, United States District Judge for the District of Nebraska, sitting by designation.

in a civil trial, and so we vacate the District Court's judgment insofar as it incorporates the City's position that it need not account for the exercise of its peremptories in a civil trial. On remand, the District Court should conduct further proceedings in accordance with this opinion.

I.

On the evening of October 9, 1984, police officers arrived at an auto parts store to investigate a burglar alarm. An attendant at a nearby service station told the officers that someone had pulled a knife. The officers then spotted John Willie Reeves, the man described by the attendant, and pursued him. Reeves fled, periodically waving a pocket knife at the officers. One officer determined at the time that Reeves was irrational and apparently mentally ill. The police, at this time numbering up to eight officers, finally surrounded Reeves, who continued to wave his knife, telling the police to get away. As one officer approached Reeves to subdue him, Reeves advanced, wildly swinging his knife. Several officers opened fire with revolvers and a shotgun, killing Reeves instantly.

At trial, Reynolds argued that the police use of deadly force in this situation was an unconstitutional deprivation of Reeves's rights, under the theory of deliberate indifference, see, *e.g.*, *Herrera v. Valentine*, 653 F.2d 1220, 1229 (8th Cir. 1981). Reynolds further claimed that the City was liable for this constitutional tort through its failure to enforce adequate standards for the use of deadly force, citing *Oklahoma City v. Tuttle*, 471 U.S. 808

(1985). At trial, Reynolds sought to introduce Little Rock Police Department investigative files on previous incidents of the use of deadly force. The District Court sustained the City's objection to the admission of the files, on the ground that the files were mostly hearsay and irrelevant.

Reynolds's expert witness, Dr. James Fyfe, testified at length about the literature on and developing standards for the use of deadly force. After overruling a City objection to Dr. Fyfe's testimony, the Court commented:

> THE COURT: Well, let's get down to the meat in the coconut. [Dr. Fyfe has] been sitting here the entire trial and has heard it all, so let's get down to this case and get his opinion on the handling of this particular case . . . What I'm interested in hearing from this witness, as far as the jury is concerned, is what he thinks that the police department did wrong in this case. That's what we're trying to get to here.

Tr. 276. On direct examination, Dr. Fyfe proceeded to testify about emerging national standards of police use of force, when the Court interjected:

> THE COURT: What standards are we talking about here? I mean, what particular standards are you talking about? This witness has been qualified as an expert and, you know, when you talk about standards as far as the standards in machine manufacturing, there are organizations that put out standards. I mean, he was very vague about standards but what – he's been qualified as an expert. What I'd like to do rather than talking about some vague standards, which as I understand his testimony, consists of everything from decisions of the Supreme Court on down to things that have been promulgated by

> the FBI Academy, by the International Association of Chiefs of Police. But what I would like for you to do and what I think is proper is to get down to this case and let's have him tell what – where in his opinion the police did not handle this properly. I mean, he's been qualified. His qualifications have been admitted as an expert. But, now, we're talking about some kind of vague standards. We're talking about abstractions and standards that haven't been really identified. We don't know what they are. But let's get down to his opinion about what happened in this case. That's the issue.

Tr. 279-80. At this point, counsel for Reynolds requested a bench conference, at which counsel objected to the District Court's comments in the presence of the jury concerning Dr. Fyfe's testimony.

After a three-day trial, the six-member jury returned a verdict for the defendants. The jury had been given five interrogatories, the first of which asked:

> Do you find from a preponderance of the evidence that the officers of the Little Rock Police Department used excessive force in attempting to effect the arrest of Willie Reeves, which proximately resulted in his death?
>
> Answer – No.

The remaining four interrogatories probed the liability of the City and each of three police officers for negligent supervision of the officers firing the fatal shots. The jury found no liability for each of the defendants.

After the selection of the jury, counsel for Reynolds noted that all the blacks on the jury panel had been struck, including two excused by the City's peremptory challenges. The District Court offered the City's counsel

an opportunity to explain those challenges, but the City's counsel stood firm on the position that the City was under no obligation to justify its exercise of peremptory strikes in a civil case.

II.

We turn first to Reynolds's objection to the District Court's exclusion of LRPD investigative files on previous instances of deadly force. All parties agree that, in general, evidence of prior incidents of deadly force may be necessary to prove the existence of a policy or custom of unconstitutional conduct. Such evidence, however, is circumscribed by the normal evidentiary rules concerning relevance and hearsay.

In this case it is not necessary to consider whether the District Court properly excluded the investigative files. Such evidence, if admitted, would tend to show only that the City was negligent in training its officers, and might therefore be liable under *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978), and *Oklahoma v. Tuttle*, 471 U.S. 808 (1985), for any constitutional violation committed against John Willie Reeves. The necessary predicate for liability of the City and individual supervisors, however, is a finding that the LRPD officers who shot Reeves used excessive force under the circumstances. The jury specifically rejected this allegation in answering Interrogatory No. 1. As a result, the jury found that no constitutional violation had occurred in Reeves's case. Where there is no underlying constitutional violation, the presence or absence of policies which permit the use of excessive force " . . . is quite beside the point." *City*

of Los Angeles v. Heller, 475 U.S. 796, 799 (1986) (per curiam). We conclude that the jury's finding that Reeves was not the victim of constitutionally excessive force robs the issue of the City's overall deadly-force policy of any further meaning. Even if Reynolds were [sic] correct that the excluded files should have been admitted, their admission would not have changed the result, in light of the jury's answer to Interrogatory No. 1.[1]

III.

We turn next to Reynolds's objection to the District Court's remarks concerning Dr. Fyfe's testimony. Reynolds argues that the District Court's remarks hopelessly undermined her ability to show that Reeves's killing was unnecessary. We disagree. Reynolds quotes extensively from comments made by the District Court during the bench conference, but we must assume such remarks were made out of the hearing of the jury. The

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[1] Because of our remand on the *Batson* issue, it is possible that a new trial will be necessary. If so, the question of the admissibility of the investigative files may recur. Issues of the admissibility of evidence are addressed to the sound discretion of the district courts and may be heavily influenced by the particular factual context in which they arise. We cannot know at this point the specific factual context in which any such issue might arise at a second trial. For the guidance of the parties and the District Court, however, we observe that we see no abuse of discretion in the action taken by the Court at the trial we are now reviewing. The facts of two previous incidents were before the jury in some detail. The actual investigative files are voluminous and contain a good deal of hearsay. In these circumstances, we see no error in the District Court's ruling refusing to admit them into evidence.

District Court's only comments heard by the jury characterized Dr. Fyfe's reference to national standards as "vague" and "abstractions," and urged counsel to "get down to his opinion about what happened in this case." In context, the District Court's comments did not impugn the reliability of Dr. Fyfe's testimony, but merely prodded counsel to direct the testimony toward the facts of Reeves's death. Furthermore, Reynolds was given full opportunity after the District Court's admonitions to examine Dr. Fyfe on the specific facts of Reeves's death. Tr. 282, *et seq.*

The District Court should carefully refrain from making comments that might prejudice a litigant in the eyes of the jury. See *Coast-to-Coast Stores, Inc. v. Womack-Bowers, Inc.*, 818 F.2d 1398, 1401 (8th Cir. 1987). On the other hand, the Court has a right to make judicious comments on the evidence, and sometimes such comments can be significantly helpful in focusing the issues. In this case the prejudicial effect of the District Court's remarks was non-existent or minimal, and the Court's comments are less troublesome than those we held non-prejudicial in *Van Leirsburg v. Sioux Valley Hospital*, 831 F.2d 169, 172-73 (8th Cir. 1987). We conclude that Reynolds was not prejudiced by the District Court's comment.

IV.

Finally, we turn to the City's exercise of its peremptory challenges to excuse the two remaining black people on the jury panel. After Reynolds's counsel complained about this result to the District Court, the Court gave the

City's attorney an opportunity to explain his choices on the record. The City's attorney declined to explain, asserting that "we do not have to justify the use of peremptories in a civil case of this manner." Tr. 26.

The City's attorney's position resembles the claim defended by the Attorney General of Kentucky and rejected by the Supreme Court in *Batson v. Kentucky*, 476 U.S. 79 (1986). In *Batson*, the Court held that " . . . the state's privilege to strike individual jurors through peremptory challenges [ ] is subject to the commands of the Equal Protection Clause." 476 U.S. at 89 (footnote omitted).

The City argues that the rule in *Batson* does not apply in this case because *Batson* involved a criminal prosecution, while here the City is defending a civil suit. The City reasons that since *Batson* is concerned with a criminal defendant's right to an impartial jury, *Batson*, involves only Sixth Amendment protections for criminal defendants, and should not be extended to the Seventh Amendment's provisions for civil juries.

We find this distinction unpersuasive. It is certainly true that *Batson* was a criminal case governed by the Sixth Amendment. However, the Court explicitly declined to discuss the merits of Batson's Sixth Amendment arguments, and instead focused exclusively on the application of equal-protection principles. 476 U.S. at 84-85 n.4. Unlike the Sixth Amendment, the Equal Protection Clause of the Fourteenth Amendment does not contain any latent distinctions between criminal and civil legal process.

The distinction that is crucial for application of equal-protection principles is that between governmental

actors and private actors. This distinction explains the Court's reasoning in *Batson* far better than the differences between criminal and civil cases. The *Batson* Court specifically declined to formulate any limit on the exercise of peremptory challenges by defense counsel, 476 U.S. at 89 n.12. If the City's rationale were correct that *Batson*'s applicability depends on the type of case, rather than the governmental affiliation of the party exercising peremptory challenges, then criminal defense counsel would confront the same limits on their peremptory challenges as prosecutors. The more natural reading of *Batson* is that its rule of non-discrimination applies only to governmental actors, without distinguishing criminal and civil legal proceedings.[2]

We conclude that the actions of government counsel in purposefully removing black jurors through peremptory challenges violates the Equal Protection Clause, whether the exclusion occurs in a criminal or a civil case.

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[2] In *Edmonson v. Leesville Concrete Co.*, 860 F.2d 1308 (5th Cir. 1988), *vacated by order granting rehearing en banc*, 860 F.2d 1317 (5th Cir. 1989), Judge Rubin wrote for a divided panel that the Fourteenth Amendment is violated when a judge must enforce a private litigant's racially motivated peremptory challenges: "The government is inevitably and inextricably involved as an actor in the process by which a federal judge, robed in black, seated in a paneled courtroom, in front of an American flag, says to a juror, 'Ms. X, you are excused.' " 860 F.2d at 1313. We agree with Judge Rubin that the focus of the equal-protection analysis in *Batson* is on the presence of governmental action with a racially discriminatory purpose. See *Batson, supra*, 476 U.S. at 93-94. We express no view on whether the action of the court alone, in a case involving no governmental litigants, can supply the necessary element of governmental action.

" 'Whoever, by virtue of a public position under a State government, . . . denies or takes away the equal protection of the laws . . . violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.' " *Columbus Board of Education v. Penick*, 443 U.S. 449, 457 n.5 (1979) (quoting *Ex Parte Virginia*, 100 U.S. 339, 347 (1880)). This principle does not evaporate when a government lawyer represents his client in a civil suit. Significantly, the *Batson* Court's discussion of the evidentiary standards for proving purposeful governmental discrimination relies mainly on cases involving the civil liability of governments in constitutional cases, *e.g.*, *Washington v. Davis*, 426 U.S. 229 (1976); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

The most obvious difference between a prosecutor and a city lawyer in a §1983 action is that a state prosecutor threatens a private defendant with loss of life or liberty, while the government lawyer in a civil suit seeks only to deny the private adversary a judgment. This difference of degree is not relevant in the present context. The equal-protection cases cited in *Batson* applied the Fourteenth Amendment to both civil and criminal trials. These cases, like *Strauder v. West Virginia*, 100 U.S. 303 (1880), and *Carter v. Jury Commission of Green County*, 396 U.S. 320 (1970), generally involve attacks on discriminatory jury-selection schemes which affected civil and criminal juries alike. The cases stress that the private parties are not the only victims of racial discrimination on juries. Excluded jurors are as aggrieved as those tried by juries chosen under a system of racial exclusion. See *Carter*, 396

U.S. at 329; *Batson*, 476 U.S. at 87. The *Carter* Court compared the discriminatory exclusion from jury service to the denial of the elective franchise. A juror is a public official, in fact a judge, pro tempore. He or she exercises governmental power. No one may be excluded from such an office by official racial discrimination. 396 U.S. at 330. And, as the *Batson* Court stressed, "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Batson*, 476 U.S. at 87.

These considerations apply as much in a civil suit against a governmental entity as to a government prosecution of an individual. In this case, a jury has had to arrive at a judgment in a traumatic episode of a police shooting of a disturbed black man. The community – particularly the black community – has an interest in ensuring that the government has not purposely excluded black people from the jury, as much as though Willie Reeves had survived the event and now stood trial for the crime of assault. We conclude that the City Attorney did have an obligation to justify his use of peremptories in this civil case.

The City argues further that since the police-officer defendants were sued in both their official and individual capacities, the City Attorney's exercise of peremptory challenges on their behalf was not government action. We disagree. The City cannot exempt itself from the Equal Protection Clause simply because its counsel also represents individuals. If the police officers sued individually had been separately represented, and their lawyer had exercised the peremptory challenges at issue, a different

question might be presented. We need not answer that question now.

Finally, the City argues that Reynolds's objection to its exercise of peremptories was untimely and equivocal in that the objection was phrased only as an "observation," and came only after the jury had been sworn. Here, the District Court accepted counsel's complaint as an objection, and clearly told both parties that the objection called for a response. Tr. 24-25. If the objection was clear and timely enough for the District Court, we will not bar Reynolds's appeal on this ground.

We therefore vacate the judgment of the District Court insofar as it adopts the position that the City need not explain its peremptory challenges against black jurors. On remand, the District Court should first determine whether plaintiff has made a prima facie case of discrimination. If it finds that a prima facie case has been made out, it should then conduct a hearing pursuant to the evidentiary standards articulated in *Batson*, 486 U.S. at 96-98. In the event that the District Court believes that the City's peremptory challenges were racially motivated, it should order a new trial. If the Court finds no racial motivation, the judgment will stand affirmed, subject, however, to plaintiff's right to appellate review of this finding of fact.

It is so ordered.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 88-2540EA

Reather Reynolds, etc., Appellant, v. City of Little Rock, et al, Appellee.	* Order Denying * Petition for * Rehearing and * Suggestion * for Rehearing * En Banc *

Appellees' suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Judge Fagg, Judge Bowman and Judge Beam would have voted to grant the petition.

Petition for rehearing by the panel is also denied.

March 26, 1990

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit.